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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-2085

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Beaudry Motor Company,

Petitioner,

v.

Abko Properties, Inc., Chrysler Corporation, Chrysler Motors Corporation, and Chrysler Realty Corporation,

Respondents.

Writ of Certiorari to the United States Court of Appeals, Ninth Circuit

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Supplemental Appendix to Petition for Writ of Certiorari

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BEAUDRY MOTOR COMPANY, an Arizona corporation,	)	CA Nos. 84-1888 84-1889
Plaintiff/Appellant/ Cross-Appellee,	)	CV 82-262 TU ACM
vs.	)	ORDER
ABKO PROPERTIES, INC., a DE corporation (formally known as CHRYSLER REALTY CORPORATION); CHRYSLER CORPORATION, a DE corporation; CHRYSLER MOTORS CORPORATION, a DE corporation; and CHRYSLER REALTY CORPORATION, a DE corporation,	)	
Defendants/Appellees/ Cross-Appellants.	)	

Before: POOLE, NELSON, Circuit Judges, and KELLEHER, District Judge*

The panel has unanimously voted to deny both the petition for rehearing and the amended petition for rehearing. Judges Poole and Nelson have also voted to reject the suggestion for rehearing en banc, and Judge Kelleher has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petitions for rehearing are DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable Robert J. Kelleher, Senior District Judge for the Central District of California, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

BEAUDRY MOTOR COMPANY, an Arizona corporation,	)	
Plaintiff,	)	No. 82-262 TUC ACM
vs.	)	ORDER
ABKO PROPERTIES, INC., et al	)	
Defendants.	)	

This matter is before the court pursuant to defendant's Motion for Summary Judgment and plaintiff's Cross Motion for Summary Judgment, under Rule 56, Fed.R.Civ.P. Defendant's Motion for Summary Judgment is granted and plaintiff's Cross Motion for Summary Judgment is denied.

Beaudry Motor Company (BMC), a Chrysler car dealership, brought this action against ABKO Properties, Inc. (ABKO), Chrysler Corporation, Chrysler Motor Corporation, and Chrysler Realty Corporation (CRC).[1] In four counts of its Second Amended Complaint, BMC alleges the defendants, acting in conspiracy with each other, engaged in acts violative of §§ 1 and 2 of the Sherman Act and the Arizona Uniform State Antitrust Act. BMC's fifth count seeks declaratory judgment.

The suit centers around the 1968 relocation of BMC's dealership. As part of that relocation, BMC purchased property from CRC for the development of a dealership facility, and obtained financing from Southern Arizona Bank for the

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[1] Neither ABKO nor Chrysler Motor Corporation presently exist as separate and identifiable identities.

construction of the facility. In obtaining this financing, Southern Arizona insisted upon additional security from BMC. A lease/sublease and Assignment of Lease and Attorn Agreement provided the additional security required.

Under the lease/sublease, BMC leased the premises to CRC for 25 years, with five options to renew for five years each. The premises were then subleased back to BMC. As per the Assignment and Attorn Agreements, the rental proceeds and BMC's position as lessor were transferred to Southern Arizona Bank.

As BMC has abandoned its antitrust claims,[2] Count 5 is the only claim remaining before this court. Count 5 seeks

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[2] During oral arguments on the motions for summary judgment, BMC advised this court and opposing counsel that it had abandoned its antitrust claims, Counts 1 through 4.

a judgment declaring the lease/sublease arrangement to be void as unconscionable.

BMC's unconscionable cause of action accrued in 1969 at the time the lease/sublease was executed. "The execution of the unconscionable lease is the event giving rise to a claim, not withstanding that it's effect may last the life of the lease." 35 Park Avenue Corporation v. Campagna, 399 N.E.2d 1144, 1145 (NY Ct.App. 1979). BMC's 14 year old lease/sublease is therefore barred by the six years statute of limitation for written contracts, A.R.S. §12-548, and the claim for declaration of unconscionability must be dismissed.

BMC's claim for declaratory judgment as to the interpretation of the lease/sublease fails to present a justiciable issue. BMC alleges the following controversies

1. Whether BMC is granted options to renew and extend sublease for the same term and conditions as are applicable to any renewals which may be granted CRC;

2. What rent is payable under the lease/sublease;

3. Whether BMC is required to pay or reimburse CRC for privilege taxes, if they are assessed;

4. Whether CRC can terminate the sublease if BMC terminates the franchise agreement with Chrysler;

5. Whether use of the property for purposes other than Chrysler dealership constitutes a breach of the lease;

6. Whether the lease/sublease has been extinguished by the doctrine of merger.

The facts show no present controversy between the parties as to the interpretation of the lease/sublease: No

rent has been demanded; no taxes have been assessed; the property is not being used for purposes other than a Chrysler dealership and there is no such threat; time for renewal of the lease/sublease has not arisen; there has been no termination of the franchise agreement, nor has there been threat of such.

"An action for declaratory relief only justifies a declaration of rights upon an existing state of fact, not one which may or may not arise in the future or which might or might not develop. Such cannot form the basis for declaratory judgment." City of Mesa v. Salt River Project Agricultural Improvement and Power District, 92 Ariz. 91, 106, 373 P.2d 722, 733 (1962), appeal dismissed, 83 S.Ct. 1018 (1963). The controversies alleged are based on facts anticipated by BMC. This

court cannot render declaratory judgment on the basis of such hypothetical disputes.

BMC's Cross Motion for Summary Judgment asserts two new legal theories not alleged in its Second Amended Complaint. BMC seeks to have the court declare the lease/sublease a mortgage under A.R.S. §33-702(A) and decree that it is extinguished now that CRC has been discharged by First Interstate Bank.[3] Under its second theory, BMC seeks equitable relief in the form of imposition of a constructive trust.

Neither BMC's original complaint nor Second Amended Complaint sound in statutory mortgage or constructive trust. The complaint would have to be amended yet again before the court could give the relief sought in the Cross Motion for Summary Judgment. "The liberal pleading

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[3] First Interstate Bank is the successor to Southern Arizona Bank.

policy in the Rules prevents dismissal of a meritorious action for purely formal or technical reasons. The district court is not required, however, to speculate over the nature of the plaintiffs' claim or to refuse to enter summary judgment for the defendant simply because the plaintiffs may, theoretically, be entitled to recover under a cause of action based on facts never alleged in the complaint." Murphy v. White Hen Pantry Co., 691 F.2d 350, 353 (7th Cir. 1982).

Rule 56(c) provides that issues of material facts must be evidenced from "the pleadings, depositions, answers to interrogatories . . . admissions on file and affidavits." BMC cannot now create a genuine issue of material fact by alleging new theories not raised in the pleadings. See Agustin v. Quern, 611 F.2d 206 (7th Cir. 1982).

For reasons stated above, defendant's Motion for Summary Judgment is granted, and plaintiff's Cross Motion for Summary Judgment is denied.

Dated this 7th day of December, 1983.

ALFREDO C. MARQUEZ
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

BEAUDRY MOTOR COMPANY, an Arizona corporation,	)	
Plaintiff,	)	
	)	No. 82-262 TUC ACM
vs.	)	ORDER
ABKO PROPERTIES, INC., et al	)	
Defendants.	)	

This matter is before the court on the defendant's application for an award of attorney's fees. The court previously granted summary judgment in favor of the defendants. The action centered around the 1968 relocation of Beaudry's automobile dealership. As part of the relocation, Beaudry entered into a lease/sublease and

assignment of lease and attorn agreement with Chrysler Realty Corporation (CRC). Beaudry's complaint contained four counts alleging that the defendants, acting in conspiracy with each other, engaged in acts violative of sections 1 and 2 of the Sherman Act and the Arizona Uniform State Antitrust Act. Beaudry's fifth count sought declaratory relief on the lease agreement on the ground of unconscionability.

The motion for summary judgment filed by the defendants is based entirely on the depositions of Lee Beaudry, president of the plaintiff corporation and his son, Robert, who is the executive vice-president of the corporation.

The defendants content they are entitled to attorney's fees on two grounds:

(1) The plaintiff's claims were brought and maintained frivolously,

unreasonably, without foundation and/or bad faith.

(2) Plaintiff's entire complaint arose out of contract and defendants are entitled to attorney's fees.

The court finds that the defendants are entitled to some attorney's fees under either theory. Very little investigation would have been required for plaintiffs to determine that the claims set forth in the complaint were barred by the statute of limitations. 15 U.S.C. §15(b), provides that private antitrust actions for damages are "forever barred unless commenced within four years after the cause of action accrues." The agreement which is the subject of the action was executed in July of 1969. The Complaint was filed in 1982. the defendants were able to establish this affirmative defense by deposing two officers of the plaintiff corporation.

Once the motion for summary judgment was filed the plaintiff abandoned the antitrust claims and attempted to change their theory on the fifth count.

The court may award attorney's fees where an antitrust action is clearly barred by the statute of limitations and was unreasonably filed. Ellingson v. Burlington Northern, Inc., 653 F.2d 1327 (9th Cir. 1981). In addition, the court may award attorney's fees to defendants in an antitrust action, despite an absence of bad faith, where there had been prior contractual dealings between the parties and the suit was unreasonable. United States v. Standard Oil Company of California, 603 F.3d 100 (9th Cir. 1979). The court finds that the defendants are entitled to recover attorney's fees under either theory.

The petition for attorney's fees contains time sheets showing 850.3 hours of attorney and paralegal time spent on defending the claims. Defendants are requesting attorneys fees in the sum of $73,594.00 and $4,956.27 in costs.[1] The recapitulation of the time schedules contains the names of four attorneys and one paralegal who worked on the case. The court has reviewed the schedule carefully and it appears that 259.8 hours are directly related to work done on the statute of limitations. It is unfortunate that the clients incurred legal expenses of approximately $150,000 in a case which had no merit to begin with. (The court is assuming that plaintiff's counsel spent the

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[1] The sum of attorney's fees requested by defendants for time on a motion for summary judgment is almost the equivalent of one year salary of a federal district judge.

same amount of time as the defendant's attorneys and probably billed their clients approximately the same amount.) Two hundred and fifty-nine hours is an inordinate amount of time to spend on a motion for summary judgment based on the statute of limitations. There were no disputed facts on the question of the statute of limitations.

Plaintiffs do not contest the billing rate set forth in the petition for attorney's fees. However, the court should exclude those hours that were "excessive, redundant or otherwise unnecessary." Hensley v. Eckerkhart, 103 S.Ct. 1933, 1939-40 (1983). The schedule shows that defense counsel spent 85.6 hours researching the question of the statute of limitations and tying arrangements, 96.8 hours in preparation of the motion for summary judgment and 68.9 hours in

depositions or preparations of the two depositions which were used for the summary judgments. These amounts are excessive. The court feels that the sum of $8,000.00 is more than fair compensation for the time that should have been reasonably spent in getting this matter dismissed on the basis of the statute of limitations. In setting this amount the court has considered the factors set forth by the Ninth Circuit in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975). This factors include:

(1) The time and labor that should have been reasonably expended;

(2) Whether new and difficult questions were presented;

(3) The skill required to properly perform the task;

(4) The preclusion of other employment caused by the litigation;

(5) The customary fee charged;

(6) Whether the fee was contingent or fixed;

(7) The limitations imposed by the client or the case;

(8) The amount involved and the results achieved;

(9) The experience, reputation and ability of counsel;

(10) The undesirability of the case;

(11) The professional relationship with the client; and

(12) Awards given in similar cases.

The court could not consider all of these factors because there was no evidence presented to the court upon all of the factors. The most important ones which the court has considered are 1, 2, 3, 5, 8, 9, 10 and 12.

IT IS ORDERED that judgment be entered in favor of the defendants and against the plaintiff in the sum of $8,000

as and for attorney's fees. Defendants have not furnished the court with any information on the costs and defendants' reply seems to have abandoned this claim. The claim for reimbursement of cost is denied.

Dated this 21st day of March, 1984.

ALFREDO C. MARQUEZ
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(CIVIL MINUTES-GENERAL)

Civil Case No. CIV-82-262-TUC-ACM

Date: January 5, 1984

Title: Beaudry Motor Co. v. Abko Properties, Inc.

HON. ALFREDO C. MARQUEZ JUDGE

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For reasons set forth in defendant's response to plaintiff's motions for new trial and to amend complaint,

IT IS ORDERED that plaintiff's motions are denied.